(16)

Supreme Court of the United States

October Term, 1943.

No. 614

COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE MFG. CORP., EAST SMITHFIELD FARMS, INC., EDELSTEIN DAIRY CO. INC., NEWARK CHEESE CO. INC., ROSEDALE DAIRY CO. INC., SODUS CREAMERY CORPORATION, and MEYER ZAUSNER,

Petitioners,

AGAINST

PAUL V. McNUTT, as Federal Security Administrator of the United States.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof

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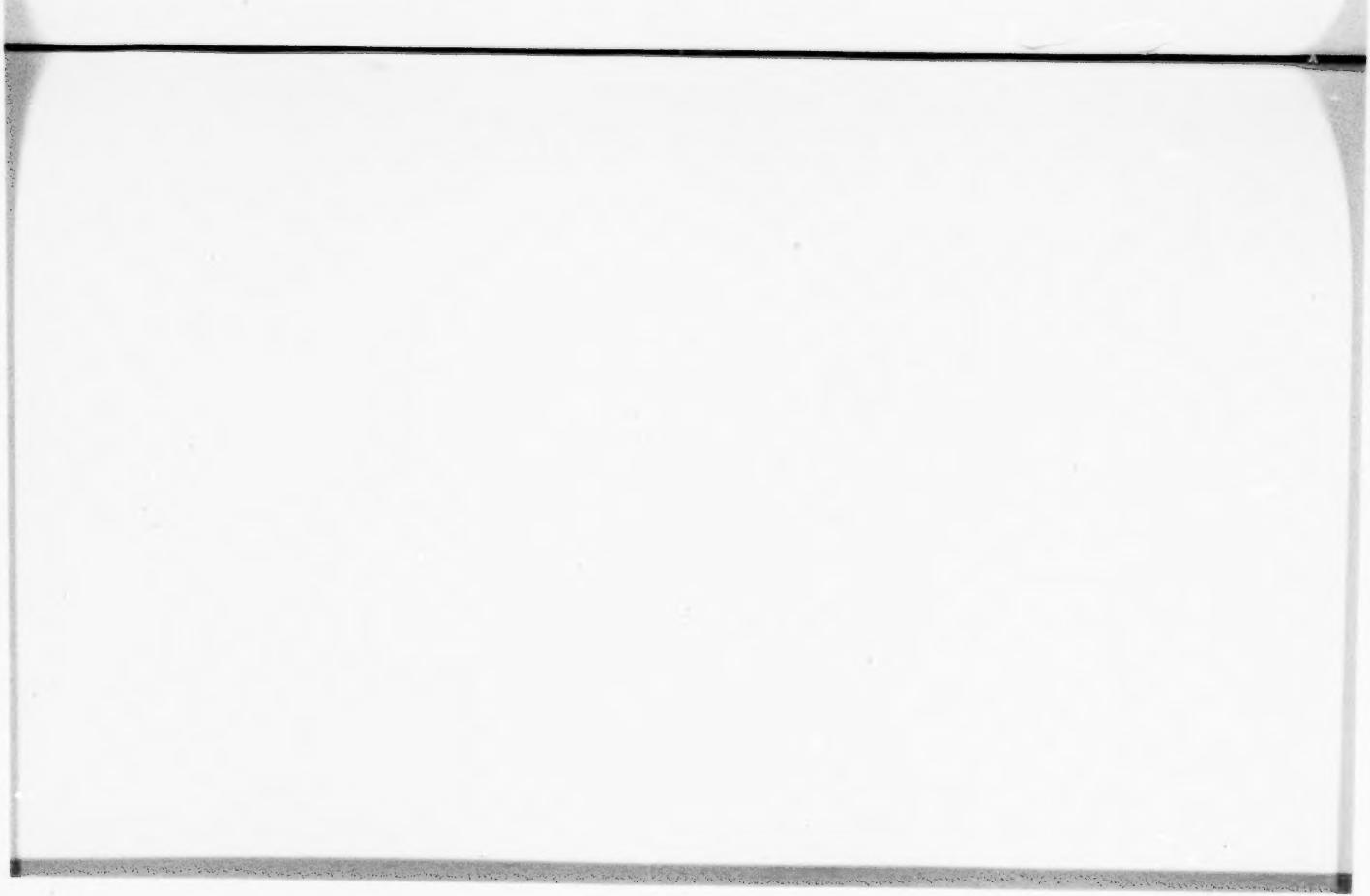

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OCTOBER TERM, 1943.

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COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE MFG. CORP., EAST SMITHFIELD FARMS, INC., EDELSTEIN DAIRY CO. INC., NEWARK CHEESE CO. INC., ROSEDALE DAIRY CO. INC., SODUS CREAMERY CORPORATION, and MEYER ZAUSNER,

Petitioners,

vs.

PAUL V. MCNUTT, as Federal Security Administrator of the United States.

—o—

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Supreme Court of the United States:

Your petitioners respectfully allege:

I.

Statute Involved.

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1046 (21 U. S. C. Section 241), provides as follows:

> Sec. 401. Whenever in the judgment of the Administrator such action will promote honesty and

fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity * * *.

II.

Summary Statement of the Matter Involved.

On December 23, 1942, after hearings held pursuant to the said Act, the Acting Federal Security Administrator promulgated regulations fixing and establishing definitions and standards of identity for "cream cheese", "neufchatel cheese", "cottage cheese" and "creamed cottage cheese". Regulation 19.515 (R. 1162) defines cream cheese as the soft uncured cheese, prepared by the procedure therein set forth, containing not less than 33 percent of milk fat and not more than 55 percent of moisture. Regulation 19.520 (R. 1163) defines "neufchatel"[1] cheese in the same terms as cream cheese except that it provides that the cheese "contains not less than 20 percent but less than 33 percent of milk fat and not more than 65 percent of moisture."

The procedure of manufacture provided for in the regulations permits the use of either of two methods, known in the trade as the "cold-pack process" and the "hot-pack process". The hot-pack process consists of heating the curd until it becomes liquid, then homogenizing it to make it smooth,—and while still liquid the cheese is poured into boxes. Cheese thus prepared is in effect pasteurized, has less bacteria, is smoother and keeps

1. There is no cheese presently known by this name. About 20 years ago an inferior product known as "neufchatel cheese" disappeared from the market and the product has been practically extinct since that time (Finding 45, R. 1155).

longer. "Cold-pack" cream cheese is simply cheese to which the "hot-pack" process has not been applied. Both regulations provide for the use of cream, milk or skim milk, if the product is "hot-packed", and water which is also used, since it is not specified, may not be used, although no reason for its exclusion is set forth in the findings. Regulation 19.525 defines cottage cheese as the soft uncured cheese prepared from pasteurized sweet skim milk, by the procedure therein set forth, containing not more than 80 percent of moisture.

Petitioners are cheese manufacturers. They constitute a majority of the manufacturers of cream cheese who participated in the Administrator's hearings. Petitioners have been manufacturing cream cheese, which the Administrator now brands as "neufchatel" cheese, for over 20 years in accordance with standards fixed by the Secretary of Agriculture as far back as 1903, and again in 1904, and again in similar substance in 1921. This standard provides, with regard to the fat and moisture requirements for cream cheese, that cream cheese must contain, in its water-free substance, not less than 65 percent of milk fat. Administrator's Regulation 19.515 raises the percentage of fat on a moisture-free basis to approximately 78 percent (Administrator's Finding 39, R. 1154), thereby excluding petitioner's product from the use of the name "cream cheese".

In order to give a name to the product which was thus deprived of its common and usual name, the Administrator resurrected the foreign sounding name of "neufchatel", which admittedly had long since fallen into disrepute, and affixed that name to the product of the petitioners. Practically all cream cheese to which the hot-pack process has been applied, and practically all cream cheese manufactured by petitioners and most other manufacturers, does not come within the fat and moisture limitations of the

Administrator's standard for cream cheese.[2] Every manufacturer but Kraft Cheese Company, applies the hot-pack process to most of its cream cheese. Every manufacturer but Kraft Cheese Company, vigorously opposed the standards fixed for cream cheese and the application of the name "neufchatel" to the product now known only by the name of "cream cheese".

Petitioners contest the validity of the regulations with respect to cream cheese and "neufchatel" cheese in the following respects: The regulations unlawfully deprive the bulk of the industry of their good will in the commonly used name of "cream cheese"; they utterly disregard existing definitions and standards of identity, and the characteristics of the product in the market; they affix a misleading name to the product now known as cream cheese and promote a monopoly in favor of the single manufacturer supporting the regulation; they are contrary to the findings in failing to make the allowance of 2 percent moisture found by the Administrator to be required; they arbitrarily exclude the use of water in the hot-pack process.

With regard to cottage cheese, Regulation 19.525 (R. 1164), the Administrator totally ignored the evidence with regard to the use of sweet unpasteurized skim milk and made no finding thereon, or other provision therefor, thereby excluding such use. The use of unpasteurized skim milk is necessary in order to secure certain desired characteristics in different types of cottage cheese, and involves no health hazard. The regulation with regard to cottage cheese also prescribes a maximum limitation of 80 percent moisture whereas the entire industry, and some of the Government's witnesses, testified that a limitation of 80 percent would be reasonable.

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2. A table of the maximum moisture and minimum fat content of the highest quality cream cheese as testified by all manufacturers at the hearing appears in the Appendix to this petition.

The present petition seeks a review of the decision of the Circuit Court of Appeals which, by a divided court, sustained the action of the Administrator.

III.

Jurisdiction.

An order denying a petition for rehearing was filed September 25, 1943 (R. 1179). The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 1180). By an order of Mr. Justice Robert H. Jackson, dated December 17, 1943, time for filing the petition for certiorari herein, was extended to January 21, 1944 (R. 1182). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1046, 1055.

IV.

Questions Presented.

The questions presented in this case are:

1. Whether the Administrator is authorized under the Act, in fixing "a reasonable definition and standard of identity" for a food "under its common or usual name so far as practicable", (a) to establish a new definition of cream cheese which excludes a major portion of the product commonly and usually known to the consumer as cream cheese without any finding that it is impracticable to retain the basic name of "cream cheese"; (b) to affix to

that major portion of the product thus excluded, the foreign sounding and misleading name of "neufchatel".

2. Whether the Administrator's definitions and standards of identity, establishing the fat and moisture content of cream and "neufchatel" cheeses: (a) are supported by substantial evidence of record; (b) are reasonable definitions and standards of identity; (c) will promote honesty and fair dealing in the interest of consumers; and (d) establish definitions of the foods in question under their common or usual names so far as practicable.

3. Whether the regulations which exclude the use of water in the hot-pack process of manufacture of cream and "neufchatel" cheeses are reasonable and based on substantial evidence.

4. Whether the regulations which exclude the use of water in the hot-pack process without any finding to support such exclusion are valid under the provisions of the Act.

5. Whether the cottage cheese regulation which excludes the use of unpasteurized skim milk, without any finding with reference to its use, is valid.

6. Whether the cottage cheese regulation limiting the maximum moisture content to 80 percent is based on substantial evidence.

V.

Dissenting Opinion in the Court Below.

The court below was divided in its decision. Mr. Justice Swan in his dissenting opinion cites at least four matters of error committed by the Administrator, which

matters of error are relied upon for the allowance of this writ (R. 1173).

VI.

Reasons Relied on for the Allowance of the Writ.

1. This is the first case to be brought before this Court which presents the issue of whether the Federal Security Administrator has the power, under the Federal Food, Drug, and Cosmetic Act of 1938, to destroy established definitions and trade practices, to exclude the major portion of a product from the use of its common and usual name, thereby depriving the bulk of an industry of its good will in that name, and to affix a strange name, wholly unfamiliar to consumers, to the product.

In *Federal Security Administrator* v. *The Quaker Oats Company,* 318 U. S. 218, this Court held that the Administrator has statutory authority to adopt a standard of identity which prohibits the indiscriminate addition of foreign ingredients (even though non-deleterious) to a basic food product where such addition would tend to cause consumer confusion. There was no issue in the *Quaker Oats* case as to the "identity" of farina, for the standard upheld in that case continued to define as "farina" what had always basically been known as farina. In the instant case however, what has been known to the consuming public only as cream cheese, ceases to become cream cheese as a result of administrative zeal to reform and enrich the product, and becomes, by administrative fiat, "neufchatel". There is moreover, no issue or finding here concerning optional ingredients or consumer confusion. The issue here moreover, is not limited to the practice of a single firm, as in the *Quaker Oats* case, but to that of an entire industry under standards in effect for 40 years.

The Court stated in the *Quaker Oats* case (p. 223) that it had granted certiorari because of the importance of the questions involved to the administration of the Foods, Drug, and Cosmetic Act. The questions involved in this case, under the same Act, are completely different from those heretofore presented and are of greater scope. Can the Administrator, under the common or usual name of a recognized product, define less than a major portion of the product? Can the Administrator change the name of a product without finding that it is impracticable to continue the use of the common or usual name? Can the Administrator, against the opposition of the entire industry, with the exception of a single manufacturer, which opposition is based upon the fact that their product is not described, establish a definition and standard of identity which fails to describe the product as generally found in the market? These are novel and far reaching issues not heretofore decided by this Court. They are of the utmost public importance and warrant the granting of this petition.

2. Because the court below, erroneously and by a divided decision, held itself powerless to review the question of the "practicability" of the continued use of the common or usual name of "cream cheese" and thereby denied petitioners the judicial review, guaranteed by the Act, of the arbitrary action of the Administrator which "deprived the bulk of the industry of their good will in the commonly used name". There was no such issue in the *Quaker Oats* case. The Act provides that the Administrator shall establish a definition and standard of identity for any food "under its common or usual name so far as practicable". The majority opinion in the court below held, "The practicability of one name or another is not, of course, a matter for our judgment" (R. 1171). The minority opinion, however, cites the requirement of the Act and holds that "without at least a finding

of impracticability, I think it unreasonable to deprive the bulk of the industry of their good will in the commonly used name" (R. 1173). The question of whether the requirement of the Act that the food be defined by "its common or usual name so far as practicable", is a matter for the court's consideration upon judicial review of an order of the Administrator, has never before been decided by this Court, or any other court, other than the divided decision in the court below.

3. Because the court below, by failing to consider existing standards, failed to decide the important issue of whether the Administrator may create a new definition and standard of identity, contrary to existing standards in accordance with which the product has been manufactured for many years. The court below ignored the definition and standard for cream cheese established by the Secretary of Agriculture in 1903, and restated in 1921. No mention is made of these standards by the court below although petitioners relied upon them as the basis for describing and defining the product in the market.

4. Because the definition of cream cheese is contrary to the Administrator's own findings. Finding 21 (R. 1151) states that in good commercial practice the percentage of fat and moisture vary as much as 2 percent above or below the percentages which the manufacturer desires to obtain in the finished product. In recognition of such variation the 35 percent for fat (Finding 20, R. 1151) was lowered to 33 percent, but the 55 percent of moisture mentioned in the same finding was not raised to 57 percent. The majority of the court states that this action of the Administrator "was peculiar to say the least since the 2 percent variation was not allowed in this constituent of the product"—a "peculiarity" which the minority opinion more accurately characterizes as "an arbitrary disregard of Finding 21".

5. Because the cream cheese standard upheld below is invalid by reason of the absence of any evidence to support basic Finding 20 (R. 1151), that most cream cheese marketed today contains from 35 to 40 percent or more of fat and 55 to 50 percent or less of moisture. The testimony of all of the witnesses was to the contrary (see Appendix). The petitioners strenuously attacked this finding in the court below and the Administrator could not defend it. The court, instead of directly passing on this finding which is perhaps the most important one in the entire order, has combined the finding with findings 23 and 37 and then expressly qualified it to the period before the discovery of the hot-pack process, which was before 1927. The court thereby failed to determine the issue of whether this finding upon which the Administrator seeks to base his regulation is supported by substantial evidence, and failed to review the order of the Administrator in accordance with the terms of the Act.

6. Because the majority opinion in the court below, erroneously and without any basis in fact, states that there was evidence that in good commercial practice water is not used in the hot-pack process, and on the basis of such an erroneous statement supports the exclusion of the use of water in the regulation (R. 1172). The Administrator himself made no such finding. The Administrator found that water is used (Finding 27, R. 1152) and made no finding of any reason why the practice should be discontinued. The absence of such a finding is pointed out in the minority opinion. The majority of the court has attempted to make a finding for the Administrator to support the Administrator's regulation. This is beyond the court's function. The fact further is that there is absolutely no evidence in the record to support such a statement and that practically all manufacturers, including Kraft Cheese Company, the lone supporter of the Administrator's standard, use water in the process (fol.

2184). There is no adulteration involved as the fat and moisture requirements must still be met in the finished product.

7. Because the majority opinion of the court below is in conflict with the Circuit Court of Appeals for the Seventh Circuit insofar as the court below sustained the Administrator's order excluding the use of unpasteurized skim milk in the manufacture of cottage cheese, despite the Administrator's failure to make a specific finding thereon. (*A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F. [2d] 258, cited in minority opinion in court below.) There was considerable evidence of the use of unpasteurized skim milk in the manufacture of cottage cheese. The Administrator simply ignored the evidence and made no finding with regard to its use or why its use should be discontinued. In so doing the Administrator failed to obey the mandate of the statute that he shall set forth detailed findings of fact on which his order is based (Section 701 [e]).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in this case insofar as the same are material to the errors herein assigned, to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Second Circuit be reversed insofar as errors therein have been assigned by your petitioners; and that petitioners be granted such other and further relief as may seem proper.

Dated: January 17, 1944.

MARTIN A. FROMER,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

Opinions of the Court Below.

The majority and minority opinions of the Circuit Court of Appeals (R. 1165-1173) are reported in 137 F. (2d) 576. Regulations 19.515 to 19.525 of the Federal Security Administrator are set forth at R. 1162-1165.

B.

Jurisdiction.

Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1046, 1055, expressly provides for review by this Court upon certiorari as provided in Sections 239 and 240 of the Judicial Code, as amended.

C.

Statute Involved.

The pertinent portions of Section 401 of the Act are set forth at page 1 above. The Act further provides as follows:

> Section 701 (e) * * * The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.

D.

Statement of the Case.

The facts are briefly stated in the petition. A more comprehensive and detailed statement of the facts and argument can be found at R. 1100-1124, wherein petitioner's memorandum in support of exceptions to the proposed order appear. We wish, however, to add the following:

The Administrator has fixed two definitions for the product now known as cream cheese. He has fixed the fat and moisture standards for the product defined as "cream cheese" above that now generally found in the market. For the bulk of the existing product he has established a definition under the name of "neufchatel", a name completely foreign to the trade and consumers, and which at one time was applied to an inferior product. Under the latter name he has created a standard so low in fat that it does not represent any product now on the market, but the net result of which is to insure that the product will be as bad as the name.

E.

Specification of Errors to Be Urged.

The majority of the Circuit Court of Appeals erred:

1. In sustaining Regulations 19.515, 19.520 and 19.525, fixing and establishing definitions and standards of identity for cream cheese, neufchatel cheese and cottage cheese.

2. In holding that the practicability of the continued use of a common or usual name is not subject to judicial review, even though the denial of such continued use de-

prived the bulk of an industry of its good will in that name.

3. In failing to give any weight or consideration to standards for cream cheese previously promulgated by the Department of Agriculture, in accordance with which the industry has manufactured the product.

4. In failing to pass upon whether basic Finding 20 (R. 1151) was supported by substantial evidence and in failing to find that most cream cheese does not conform to the definition established.

5. In failing to reject the Administrator's arbitrary omission to make the 2 percent adjustment for moisture found to be necessary—an omission which the court itself characterized as "peculiar to say the least".

6. In failing to hold that the exclusion of the use of water was invalid in that there was no finding of any reason to exclude the use of water in the hot-pack process.

7. In holding that there was evidence that in good commercial practice water is not used in the manufacture of cream cheese by the hot-pack process.

8. In holding that there were findings that skim milk used in the manufacture of cottage cheese is "usually" pasteurized whereas there were no such findings.

9. In failing to hold that the Administrator had ignored the evidence as to the use of unpasteurized skim milk and had failed to make any finding to support its exclusion from the cottage cheese standard.

10. In holding that the moisture limitation for cottage cheese was based on substantial evidence.

F.

Argument in Support of Granting the Writ.

POINT I.

The court below erred in failing to find that the cream cheese and "neufchatel" standards are invalid because they do not identify the product by its common or usual name so far as practicable.

The Act expressly provides (Section 401), and this Court has held (*Federal Security Administrator* v. *Quaker Oats Company*, 318 U. S. 218, 232), that the "standards are to be prescribed and applied, so far as is practicable, to food under its common or usual name". The court below is divided in its opinion as to whether the practicability of a name is a matter for its judgment (R. 1171, 1173). This question has never been decided by this Court. In the *Quaker Oats* case, there had been no attempt to deprive any manufacturer of its right to use the basic and common or usual name of the food in question, namely, "farina" (see Petition, *supra*, p. 7). This statutory limitation was placed by Congress upon the actions of the Administrator and it is for the judicial tribunal to determine whether the Administrator has acted within the limits of the power granted to him. *Morgan* v. *United States*, 298 U. S. 468, 479). The arbitrary imposition of a name neither common nor usual may be confiscatory, and the courts certainly have the power to so find it. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217.

In the instant case the name "neufchatel", a name difficult to pronounce, foreign in sound, which many years back was used for an inferior product (Finding 45, R. 1155), and which is a misleading name, has been affixed to

the petitioners' product of cream cheese (O. P. Exhibit No. 9, R. 1045; fols. 1705-1712, 1778, 1864, 2077, 2122). The name thus affixed, does not "inform purchasers of what they are buying." *United States* v. *Antikamnia Chemical Company*, 231 U. S. 654, 665.

As found in the minority opinion below, the bulk of the industry have been deprived of their good will in the commonly used name without even the finding that it is impracticable to distinguish between cheese of different milk fat by the use of adjectives such as "light" cream cheese and "heavy" cream cheese. See *N. Fluegelman & Co.* v. *Federal Trade Commission*, 37 F. (2d) 59, 61; *Federal Trade Commission* v. *Casoff*, 38 F. (2d) 790, 791. Compare *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. The use of the name cream cheese constitutes a valuable property right of the petitioners which should not be destroyed if less drastic means can accomplish the result sought. If the end sought by the Administrator, which in this case evidently is to distinguish between high fat and low fat cream cheese, can be effected without hardship to petitioners and others in the industry, it cannot be said that a choice which results in hardship is reasonable or practicable. *Nolan* v. *Morgan*, 69 F. (2d) 471, 474. The end could have been achieved by requiring proper qualifying words to be used in immmediate connection with the name cream cheese. *Federal Trade Commission* v. *Royal Milling Co., supra.*

The record contains several practical definitive adjectives which could have been used (fols. 1230, 1528-1529, 2120-2121, 2266). Similar terms have been used by the Administrator in connection with other foods, for example, "light" cream and "heavy" cream (Federal Security Administrator Regulations, Secs. 18.500 to 18.515); "farina" and "enriched" farina, "flour" and

"enriched" flour, etc. There always has been retained at least the basic name of the food in question. This is the first attempt on the part of the Administrator to completely change a recognized common and usual name, and it is in the public interest that this Court determine whether the Administrator has that power.

POINT II.

The court below erred in sustaining standards for cream cheese and "neufchatel" which do not define the product as it exists.

The Act provides that the Administrator shall fix a "definition and standard of identity". To define is "to state precisely the meaning of; describe the nature and properties of". Funk and Wagnall's, New Standard Dictionary, Med. Ed. (1941). The Administrator's regulation for cream cheese does not describe the product defined by the Secretary of Agriculture for 40 years as cream cheese, nor the product known to the industry and consumers by that name. The Government's chief witness bluntly stated that he was not fixing a standard based on what exists today (fols. 2378, 2617). The court below erred in sanctioning such practice and in failing to consider existing definitions and standards and the existing product.

Congressional intent in determining whether existing definitions should be followed, and the major portion of a product described in fixing a definition, can be gathered from the legislative history of the Butter Standards Act of 1923, 42 Stat. 1500, cited by this court in the *Quaker Oats* case (p. 232), by which Act Congress itself fixed a standard for a dairy food. The butter standard was fixed in accordance with the definition established by the Joint Committee on Definitions and Standards and by the Department of Agriculture (*Federal Security Administrator* v. *Quaker Oats Company*, 318 U. S.

218, 233; 64 Cong. Rec. 3229), the same agencies which established the definition for cream cheese which the Administrator is attempting to change (tols. 18-22), and in accordance with requirements which the industry as a whole favored (64 Cong. Rec. 3232).

The standard for cream cheese established by the Joint Committee on Definitions and Standards and by the Department of Agriculture define cream cheese as containing not less than 65 percent milk fat in the water-free substance (Service and Regulatory Announcements, Food and Drug No. 2). The entire industry has been manufacturing cream cheese in accordance with this standard, containing less than 33 percent fat and more than 55 percent moisture. The Administrator's standard raises the fat requirement from 65 percent to about 78 percent in the water-free substance (Finding 39, R. 1154). This standard does not describe most cream cheese as it now exists.[3]

While the Administrator purports to find that "most of the product marketed today as cream cheese" contains more than 35 percent fat and less than 55 percent moisture (Finding 20, R. 1151), the lack of any evidence to support these findings is demonstrated by Government's Exhibits Nos. 2, 4, 13 and 14, and by the testimony of all of the manufacturers (see Appendix).[4] The court below,

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(3) Government Exhibits Nos. 2 (R. 367-371) and 4 (R. 1013-1025) consist of tabulations of fat and moisture tests of random samples of cream cheese gathered by Government investigators in various cities. A count of these samples demonstrates that a majority do not comply with the standard. An examination of Government Exhibit No. 12 (R. 1041), which gives the maximum and minimum fat and moisture content of the samples contained in Exhibit 2, shows that the 96 samples there tested (See Exhibit 2), of which 57 do not comply with the standard, are distributed among 37 brands, and that of these 37 brands only 5 consistently comply with the standard. Government Exhibit No. 13 (R. 1042) demonstrates that of 71 brands, 63 do not consistently conform to the standards fixed. An examination of the 48 samples of cream cheese collected in New York City and tabulated in Government's Exhibit No. 4 (R. 1021-1022) indicates that 43 out of 48 samples do not comply.

(4) Even the Administrator in his answering brief in the court below, would not go as far as his own findings that the product was made *within* the limits fixed, but only *approximating* such limits (Respondent's brief below, pp. 19, 20, 34). An examination of the references to the record to determine the meaning of the word "approximating" indicated that the approximation was never *within* the limits fixed.

misconstruing the Administrator's Finding 20, held "that much, if not most of the cream cheese sold *before the discovery of the 'hot-pack' process* contained from 35 to 40 percent of fat and from 55 to 50 percent of moisture". (Italics supplied, R. 1171.) That would be before 1927. But that is not the Administrator's finding on which he bases his standard. The administrator's finding is that "*most* of the product marketed *today* as cream cheese" contains the said fat and moisture percentages. The result of this misconstruction was that the court failed to examine the evidence to ascertain whether basic Finding 20, as made, was supported by substantial evidence.

The Act requires that the Administrator "base his order only on substantial evidence of record", and "set forth as part of his order detailed findings of fact on which the order is based" (Section 701 [e]). An order based on a finding which is not supported by evidence is an arbitrary act against which the courts afford relief. *Northern Pacific Ry.* v. *Department of Public Works*, 268 U. S. 39, 44. It is not the court's function to make findings but to examine the evidence to ascertain whether the findings made are properly supported. *Morgan* v. *United States*, 298 U. S. 468, 480, 481; *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258, 260.

A definition promulgated by the Secretary of Agriculture must be presumed to have been arrived at fairly and to describe the product in question, and should not arbitrarily be discarded in such manner as to destroy the good will of the bulk of the industry in the name of the product. Certainly that was not the intention of the President when he stated that the honest enterpriser would "be asked to do no more than he now holds himself out to do" (President's Message, House Rep. 2755, 74th Cong. 2d Sess., pp. 1-2), nor of Congress in stating that the Act "merely sets up checks against the small but un-

scrupulous minority" (House Report No. 2755, 74th Cong., p. 3). The petitioners are not "a small but unscrupulous minority"; they are the industry. The issue of whether the Administrator may thus disregard the industry as a whole, existing standards, and existing practice, has never been decided by this Court.

POINT III.

The court below erred in sustaining the Administrator's "peculiar" omission to make the necessary adjustment for moisture in the cream cheese standard.

The Administrator, as the basis for his regulations, found that cream cheese contains 35 percent or more fat and 55 percent or less moisture (Finding 20, R. 1151); that in good commercial practice fat and moisture in the finished cheese vary as much as 2 percent above or below the percentages which the manufacturer desires to obtain in the finished product (Finding 21, R. 1151); and that with due allowances made for the fat and moisture variations thus found, a reasonable minimum limit for fat is 33 percent and a reasonable maximum limit for moisture is 55 percent (Finding 23, R. 1151). Thus the 35 percent fat content was dropped to 33 percent, but the 55 percent moisture content was not raised to 57 percent.

The minority opinion in the court below characterizes the Administrator's action as "an arbitrary disregard of Finding 21" (R. 1173). The majority opinion characterizes his action as "peculiar to say the least", but endeavors to support the limitation of 55 percent moisture on the ground that "a product of more than 55 percent moisture, if not subjected to the 'hot-pack' process, acquires different but closely related characteristics of cream cheese" (R. 1171-1172). The fallacy of this statement is

demonstrated by the fact that all manufacturers make cream cheese containing more than 55 percent moisture, and that the best quality "cold-pack" cream cheese of the Kraft Cheese Company, contains more than 55 percent moisture (see Appendix). However, even if this were not the fact, there is no justification for basing a standard for "hot-pack" cream cheese upon the characteristics of "cold-pack" cream cheese, and any regulation which proceeds on such a premise is arbitrary, unreasonable and discriminatory.[5]

Inasmuch as Finding 23 recites that due allowance is being made for the moisture variance referred to in Finding 21, and then fails to make such allowance, the petitioners stated in their brief in the court below (p. 49): "Nowhere does the Administrator set forth any reason for omitting the adjustment as to moisture, and it may very well be, for all that appears, that the omission was inadvertent rather than intentional". Neither in argument or brief has this observation been answered. The Administrator's regulation is contrary to his own finding. The privilege of invoking judicial review is of purely illusory value if the reviewing court upon determining that the findings are supported by substantial evidence, fails to consider whether the findings support the regulation. An order, such as the Administrator's regulation with regard to the moisture content of cream cheese, which is in flat opposition to the findings should not be permitted to stand. *Chicago Ry. Co.* v. *U. S.*, 284 U. S. 80, 96, 100. Compare *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197.

(5) Because of the desirable characteristics which the hot-pack process imparts to the cheese a major and ever increasing portion of cream cheese is subjected to this process (See Appendix; fols. 1009-1010, 1582).

POINT IV.

The court below erred in failing to hold that the Administrator had arbitrarily and unreasonably excluded the use of water in the hot-pack process without any supporting finding.

In manufacturing cream cheese by the hot-pack process, a liquid is commonly used with which to heat the cheese and adjust the fat and moisture; the liquid may be cream, milk, skim milk or water (fols. 1357, 1805-1806, 2184). Only one manufacturer testified that he did not use water in the hot-pack process, but that manufacturer further testified that with their particular type of equipment they added no liquid at all (fol. 1649). The Administrator failed to provide for the use of water and thereby excluded its use. As the minority opinion below observed, there is no finding of any reason why the present practice must be discontinued.

The majority in the court below goes further than the Administrator's own findings and states that there was evidence that in good commercial practice water was not used (R. 1172). The court erred however, as there was no finding or evidence to this effect and the court could not cite such finding or evidence. The Administrator himself could not point to the testimony of a single witness who testified with regard to the manufacture of cream cheese to support the contention that in good commercial practice water was not used. On the contrary, the Government's own expert testified that water is better to add than skim milk (fol. 1728) and Government counsel himself stated that there was no issue as to how the adjustment is made (fol. 1807). The finished product must still comply with the fat and moisture requirements of the standard whatever liquid is added for the purpose of adjustment. The exclusion of the use

of water is in no way shown to promote honesty and fair dealing in the interest of consumers, which is the foundational basis of the Administrator's action. *Twin City Milk Producers Ass'n* v. *McNutt*, 122 F. (2d) 564, 566.

While it is true that it is not the function of the court to substitute its judgment for that of the Administrator, neither is it the function of the court to make findings for the Administrator. *Wichita R.R.* v. *Public Utilities Commission*, 260 U. S. 48, 54; *Florida* v. *United States*, 282 U. S. 194, 215. It is a specific requirement of the Act that the basic fact conditioning action by the Administrator be stated in a finding and stated there expressly (Section 701 [e]). There is no finding by the Administrator on which to base an order excluding the recognized use of water. In default of such a finding, the condition subject to which the legislative power was delegated has not been fulfilled. *Mahler* v. *Eby*, 264 U. S. 32, 44; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 448; *United States* v. *Chicago, Milwaukee R.R. Co.*, 294 U. S. 499, 504.

The provision for judicial review means more than a search for "some" evidence to support a particular finding. The evidence must be "substantial". Section 701 (e) of the Act; see *N. L. R. B.* v. *Columbian Enameling Co.*, 306 U. S. 292, 300; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229. Not only is there no substantial evidence to support the exclusion of the use of water, there is no evidence at all to support such a regulation, nor is there any finding of any reason why the practice must be discontinued. The court below erred in attempting to make a finding for the Administrator, and further erred in making a finding which is not based upon substantial evidence.

POINT V.

The court below erred in sustaining the Administrator's arbitrary exclusion of the use of unpasteurized skim milk in the manufacture of cottage cheese without any finding to support such exclusion.

Regulation 19.525 provides for the use of only pasteurized skim milk in the manufacture of cottage cheese. Although the petitioners and others presented considerable evidence concerning the use of unpasteurized skim milk in the manufacture of cottage cheese, and the necessity for its continued use (fols. 2010, 2012-2018, 2715, 2728, 2731, 2744, 2745, 2766, 2789, 2790), "the Administrator ignored the evidence as to the use of unpasteurized skim milk. He made no finding on the subject. The right to present evidence is a barren one if the trier of fact may fail to consider it. See *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258, 261 (C. C. A. 7)" (Swan, *J.*, R. 1173).

In the *Staley* case, the petitioner had appeared at the hearing and offered evidence to the effect that corn syrup is a suitable sweetening ingredient in sweetened condensed milk. The Administrator made no finding with reference to its use. The court held that "unless a specific finding is made with reference to corn syrup or an exclusive finding made with reference to refined sugar and corn sugar, the interests of the consumers have not been given that consideration which Congress had in view; consequently, the order is not made in accordance with law".

Similarly, in the instant case, the Administrator made no exclusive finding that only pasteurized skim milk is used in the manufacture of cottage cheese, nor has he made a specific finding with reference to the use of un-

pasteurized skim milk. Consequently the order is invalid. *Baltimore & Ohio R.R. Co.* v. *United States*, 293 U. S. 454, 463; *Mahler* v. *Eby, supra; Panama Refining Co.* v. *Ryan, supra.* The court cannot supply the finding which the Administrator failed to make. *Florida* v. *United States*, 282 U. S. 194, 215; *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 54.

Conclusion.

WHEREFORE, petitioners respectfully pray that the petition for writ of certiorari be granted, the cause reviewed, and the judgment of the Circuit Court of Appeals for the Second Circuit reversed insofar as error therein has been assigned by petitioners.

Respectfully submitted,

MARTIN A. FROMER,
Attorney for Petitioners.

APPENDIX.

The utter lack of uniformity of a minimum of 35 percent fat and maximum of 55 percent moisture is demonstrated by the following table:

MAXIMUM MOISTURE AND MINIMUM FAT IN NO. 1 **(Highest Quality)** CREAM CHEESES AS TESTIFIED BY ALL MANUFACTURERS WHO TESTIFIED AT HEARING

	Hot Pack Cream Cheese		**Cold Pack Cream Cheese**		
Manufacturer	Percent Maximum Moisture	Percent Minimum Fat	Percent Maximum Moisture	Percent Minimum Fat	Ratio of Hot Pack to Total Production
Breakstone	62 (fol. 588)	28 (fol. 588)	57 (fol. 587)	34 (fol. 586)	15% (fols. 587-588)
Borden	60 (fol. 2144)	31 (fol. 2144)	55* (fol. 766)	37 (fol. 766)	56% (fol. 1582)
Columbia	61 (fol. 1449)	29 (fol. 1352)			100% (fol. 1351)
Conestoga	60 (fol. 372)	25 (fol. 361)	57 (fol. 372)	34 (fol. 361)	75 to 80% (fol. 361)
East Smithfield	Not stated	31 (fol. 1301)			100% (fol. 1225)
Fairmont	58 (fol. 880)	33 (fol. 880)			Almost 100% (fol. 908)
Kraft	60 (fol. 1934)	Average 29.8 (fol. 1933)	58** (fol. 2098)	34.5 (fol. 2098)	Not Stated
Newark	60 (fol. 1819)	32 (fol. 1780)			100% (fol. 1815)
Rosedale	60 (fol. 346)	25 (fol. 337)	56 (fol. 346)	33 (fol. 337)	Not Stated
Zausner	60 (fol. 2105)	32 (fol. 2105)	57 (fol. 2105)	37 (fol. 2105)	Not Stated

*There is no indication in the record of any maximum or minimum. This figure must be presumed to be an average.

**According to testimony of Mr. Page. Dr. Stine, who also testified for Kraft, indicated that at different plants of the Kraft Company the moisture maxima varied from 52.1 to 57 percent (fols. 2180-2181).

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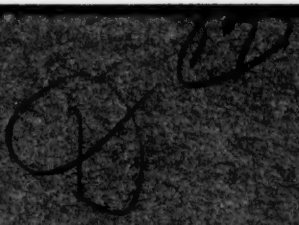


No. 614.

In the Supreme Court of the United States

OCTOBER TERM, 1945.

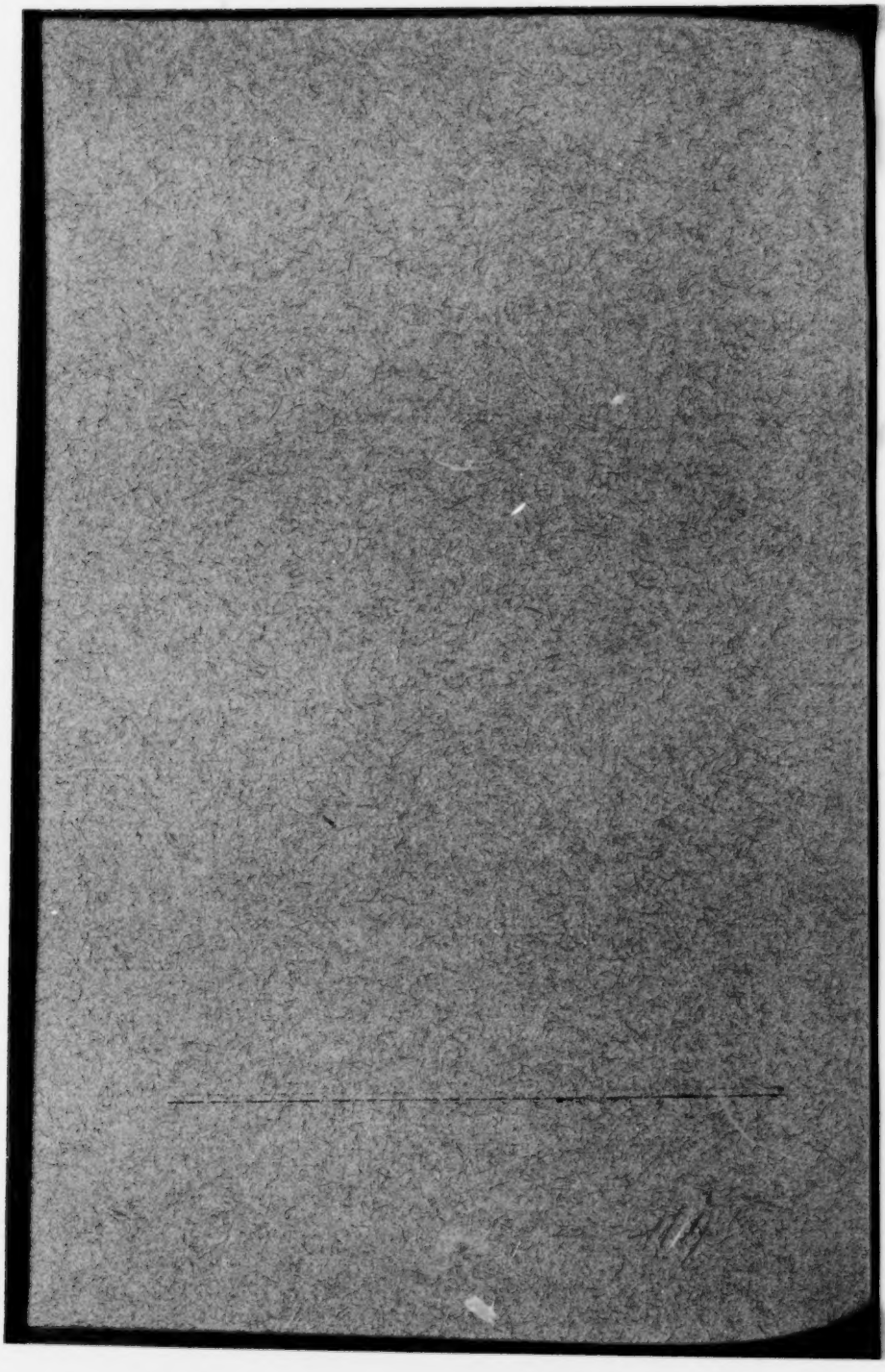
COLUMBIA CITIZENS CO., CONNECTICUT CHEMICAL CITIZENS MFG. CORP., EAST SOUTHFIELD FARMERS EDUCATIONAL DAIRY CO., INC., NEWARK CITIZENS CO., INC., ROSEDALE DAIRY CO., INC., DAIRY CHEMICAL CORPORATION, AND MILTON ASSOCIATION, PETITIONERS

v.

PAUL V. MCNUTT, AS FEDERAL SECURITY ADMINISTRATOR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 614

COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE MFG. CORP., EAST SMITHFIELD FARMS, INC., EDELSTEIN DAIRY CO., INC., NEWARK CHEESE CO., INC., ROSEDALE DAIRY CO., INC., SODUS CREAMERY CORPORATION, AND MEYER ZAUSNER, PETITIONERS

v.

PAUL V. MCNUTT, AS FEDERAL SECURITY ADMINISTRATOR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority (R. 1165–1172) and dissenting (R. 1173) opinions in the circuit court of appeals are reported at 137 F. (2d) 576.

JURISDICTION

The judgment of the circuit court of appeals was entered on October 18, 1943 (R. 1180), after

a petition for rehearing (R. 1174–1178) had been denied on September 25, 1943 (R. 1179). By an order of Mr. Justice Jackson, dated December 17, 1943 (R. 1182), the time for filing a petition for a writ of certiorari was extended to and including January 21, 1944. The petition for a writ of certiorari was filed on January 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938 (52 Stat. 1040, 1055, 21 U. S. C. 371 (f) (4)).

QUESTIONS PRESENTED

The ultimate question is whether Regulations 19.515, 19.520, and 19.525 of the Federal Security Administrator are valid as applied to petitioners. This depends upon whether they are (a) supported by findings based on substantial evidence of record, and (b) within the authority of the Administrator under the Federal Food, Drug, and Cosmetic Act of 1938, with respect separately to the following particulars:

(1) The exclusion by Regulation 19.515, from the cream cheese standard, of those products of petitioners ranging from about 25 percent to 32 percent in milk-fat and up to 65 percent in moisture, which have been sold by them for a number of years by the name "cream cheese."

(2) The failure of Regulation 19.515 to extend the maximum for moisture content in cream cheese from 55 percent to 57 percent so as to allow for a recognized variance of up to 2 percent in the process of manufacture.

(3) The assignment by Regulation 19.520 of the name "neufchatel cheese" to petitioners' low-quality cheese which is excluded from the cream cheese standard.

(4) The failure of Regulations 19.515 and 19.520 to permit the addition of water to the curd in the "hot-pack" process of making cream cheese and neufchatel cheese.

(5) The requirement of Regulation 19.525 that the skim milk used in the manufacture of cottage cheese be pasteurized.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938 in pertinent parts (52 Stat. 1040; 21 U. S. C. 301 *et seq.*) provides:

> SEC. 401. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container; * * * [21 U. S. C. 341.]

SEC. 701 * * *.

* * * * *

(e) The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401 * * *. At the hearing any interested person may be heard in person or by his representative. * * * The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. * * *

* * * * *

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. [21 U. S. C. 371.]

STATEMENT

1. *History of the proceedings.*—The administrative proceedings leading to the promulgation of the challenged order of the Federal Security Administrator (R. 1148–1165) were commenced in August 1939, by notice of public hearing to be held upon a proposal to establish a definition and standard of identity for cream cheese pursuant to the authority conferred by Sections 401 and 701 (e) of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, pp. 3, 4).[1] At the hearing,[2] some of petitioners appeared and gave testimony, and thereafter filed briefs stating their opposition to the proposal on which the hearing was held. A proposed order, containing findings of fact and a proposed regulation, was issued on September 28, 1940. (R. 1061–1068.) The proposed regulation would have required that cream cheese contain not less than 34 percent of milk-fat and not more than 55 percent of moisture (R. 1067). Petitioners filed exceptions (R. 1069–1075), and upon their application the cream cheese hearing was reopened, after notice (6 Fed. Reg. 1381), and consolidated with a previously announced hearing on proposals for standards for neufchatel, cottage, and creamed cottage cheeses (6 Fed. Reg. 679, 1381). Petitioners participated in the subsequent

[1] 4 Fed. Reg. 3683 (August 22, 1939).

[2] The hearing was held October 2–6, 1939.

hearing,[3] and filed written arguments in favor of a standard allowing lower fat and higher moisture content than the 34 percent fat-55 percent moisture limits which were proposed for cream cheese. On July 17, 1942, the Acting Federal Security Administrator issued a proposed order (R. 1075–1093), setting forth findings of fact and proposed regulations to which petitioners filed exceptions (R. 1093–1124). The final order (R. 1148–1165), substantially identical with the proposed order of July 17, 1942, was promulgated on December 22, 1942, after due consideration and rejection of petitioners' exceptions to the proposed order. The final order establishes, by separate regulations, "definitions and standards of identity"[4] for cream cheese, neufchatel cheese, cottage cheese, and creamed cottage cheese. It includes 81 specific fact findings, setting forth in detail the basis of the Regulations.

In a statutory review proceeding brought in the United States Circuit Court of Appeals for the Second Circuit, pursuant to Section 701 (f) of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, p. 4), all of petitioners' objections to the four regulations promulgated by the Federal Security Administrator's final order were rejected, and all four of the regulations were

[3] This hearing was held April 21–May 2, 1941.

[4] The simpler term "standard" will frequently be used herein in lieu of the statutory phrase "definitions and standards of identity."

affirmed in their application to petitioners (R. 1165–1172, 1180), one judge dissenting in part (R. 1173). In their petition for a writ of certiorari petitioners have abandoned the challenge made in the court below to the creamed cottage cheese standard (Regulation 19.530; R. 1165), so that the issues here are related exclusively to the cream cheese, neufchatel cheese, and cottage cheese standards (Regulations 19.515, 19.520, and 19.525; R. 1162–1165).

2. *The Regulations.*—(a) By Regulation 19.515 (R. 1162–1163) cream cheese is required to contain by weight not less than 33 percent of milkfat and not over 55 percent of moisture. It must be made from a pasteurized starting mixture of cream with milk or skim milk or both. It may be hotpacked,[5] "with or without added cream or milk or skim milk or any mixture of two or all of these." Water, not being specified, may not be added. Not to exceed 0.5 percent by weight of one or a mixture of two or more of several designated moisture-retaining gums may be added as optional ingredients, provided their presence is declared on the label.

(b) Regulation 19.520 (R. 1163–1164) prescribes a standard for neufchatel cheese, which must be made in the same manner and from the

[5] The hot-pack process supplemented the previously established manufacturing process by heating the product and then homogenizing the heated curd (R. 16, 41, 70, 73, 113–114, 285).

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same basic ingredients as cream cheese, except that the milk-fat content may vary from 20 to 32 percent inclusive and the moisture content up to a maximum limit of 65 percent.[6]

(c) By regulation 19.525 (R. 1164–1165) cottage cheese is required to contain not more than 80 percent of moisture, and to be made from pasteurized sweet skim milk.

3. *The evidence adduced at the hearing.*—The evidence on which the Regulations were based may be summarized as follows:

a. *Cream cheese is identified by its high-fat, low-moisture content.*—All cream cheeses basically are made by the "neufchatel" process (R. 71, 15–16, 67, 72–73, 110–113, 966–968). Consumers identify these various cheeses by their appearance, body, flavor, odor and texture (R. 76–77, 117, 394, 550, 703–704, 715). The chief factors determining these characteristics are the milk-fat

[6] Under section 403 (g) (52 Stat. 1047, 21 U. S. C. 343 (g)) a food is misbranded "if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard * * *" (Cf. *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218). The misbranded product would be subject to seizure and condemnation under section 304 (a) (21 U. S. C. 334 (a)) and any person shipping it in interstate commerce would be subject to criminal penalties under sections 301 (a) and 303 (a) (21 U. S. C. 331 (a) and 333 (a)) (Cf. *United States* v. *Dotterweich*, No. 5, decided November 22, 1943).

content which is closely related to moisture content (R. 126, 687, 721–723, 831), and variations in manufacturing techniques (R. 52, 230, 240, 721). Cream cheese differs from neufchatel cheese in having a higher milk-fat content, smoother body, creamier taste and finer flavor (R. 110). The characteristic smooth body and texture and the flavor resulting in part from the method of manufacture "but particularly from the characteristically high butter-fat content" (R. 687) are important factors in the identity of cream cheese (R. 117, 199, 231–232, 277, 364, 687).

Traditionally cream cheese was made from cream, characterized in agricultural publications and government bulletins as "rich" or "thick" cream (R. 67–68, 69, 81, 310); cheese made according to the methods described in the literature cited in the record would run in the neighborhood of 40 percent of fat and 50 percent of moisture (R. 73). About the close of the nineteenth century the mechanical separator was introduced and later the use of the Babcock test permitted the standardization of milk and cream on the basis of fat content (R. 312–313). During the period 1912–1920 cream cheese varied from about 32 to 43 percent in fat, with the moisture running from below 40 percent to an exceptional high of about 59 percent (R. 75, 225, 273). In 1921 the Secretary of Agriculture, acting under the

original Pure Food and Drugs Act of 1906 (34 Stat. 768), issued a standard of identity for cream cheese providing that it should contain "in the water-free substance, not less than sixty-five percent (65%) of milk fat" (R. 22). This standard was purely advisory and did not have the force or effect of law.[7] By relating the milk-fat content to the water-free substance, rather than to the total weight of the product including the moisture content, it theoretically recognized as cream cheese a product containing 90 percent of moisture and 6.5 percent of milk-fat, since in such a case the 6.5 percent milk-fat content would constitute 65 percent of the water-free substance. So long, however, as only the cold-pack process[8] of manufacture was used, the moisture content

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[7] The predecessor Act of 1906 did not, as does the 1938 Act, authorize the promulgation of legal standards of identity and provide that foods not complying with such standards established for them should be deemed misbranded. So-called standards set up by the Secretary of Agriculture under the 1906 Act were purely administrative, and in a prosecution the defendant was free to urge a different criterion. In 1930 the so-called McNary-Mapes Amendment (46 Stat. 1019, 21 U. S. C. 10) authorized the fixing of legal standards for canned foods, and provided that the failure of a product to comply with such a standard should be shown on the label. For a full discussion, see Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 Law and Contemporary Problems (Duke University) 2, 25–26 (1939).

[8] "Cold-pack" cream cheese is simply cream cheese to which the so-called "hot-pack" process has not been applied.

remained within reasonable limits, since if it were too high the cheese would "leak" so badly that it would not be salable as cream cheese (R. 79, 102, 125–126).

b. *The development of the hot-pack manufacturing process and the use of moisture-retaining gums resulted in a cheese product with less fat and more moisture than cream cheese has traditionally contained.*—Beginning about 1928 the modification now known as the "hot-pack process" developed, following discovery that the addition to cream cheese curd of a water-retaining substance, such as locust bean gum, would prevent leakage, and that liquefying the curd by heating it and putting the liquid containing the gum through a homogenizer, would produce a smooth homogenous product (R. 16, 44–45, 70, 73, 113–115, 851–854). There is nothing wrong with either the hot-pack process or the use of moisture-retaining gums, as the Administrator recognizes by allowing their continuance, so long as they serve only the legitimate functions of making a better-keeping product and preventing leakage of the normal moisture content (R. 16, 39–41). As both were originally used they served only these functions.

An industry witness testified that when he first became acquainted with cream cheese made by the hot-pack process in 1928, it ran 37 to 40 percent of fat and 50 to 53 percent of moisture (R.

274). The best quality hot-pack product made by the Kraft Company today averages 32 to 36 percent of fat and 51 to 54 percent of moisture (R. 275). Witness Riggs, representing the Kraft Company, testified that "As we originally used the gum in cream cheese * * * it was a relatively high-fat, low-moisture cream cheese, and it was to prevent the seepage or leakage of water. * * * I was somewhat * * * responsible for the introduction of gum. I have sometimes regretted that, because it appears to me that the use of gum has extended to purposes for which it was not originally intended, that is, to hold excess moisture in the cheese" (R. 283).

The hot-pack process coupled with the use of moisture-retaining gums resulted in the manufacture and sale by the name "cream cheese" of a product of considerably lower fat and higher moisture content than that theretofore sold as cream cheese (R. 142, 195, 215, 242–243, 263). It ranges from about 23 to 30 percent of fat and from about 60 to 65 percent of moisture (R. 169–170, 195, 263, 271, 275–276, 429–430). It was first introduced in 1932 or 1933 (R. 215) and has been made in substantial quantities only since 1934 or 1935 (R. 235). Most of it is manufactured and distributed in a limited area—chiefly in the eastern metropolitan centers; it does not have nation-wide distribution (R. 289–290, 328). The fat content of the better grades of cream cheese has remained

constant (R. 100) or even increased through the years (R. 226). The finding (Finding 20; R. 1151) that most of the cream cheese marketed today contains from 35 to 40 percent or more of fat and from 55 to 50 percent or less of moisture is supported by two surveys conducted by the Food and Drug Administration of both cold-pack and hot-pack cheese, and by the testimony of industry witnesses including those representing petitioners. The first survey (Gov. Ex. 2; R. 367) made in 1938, included thirteen states. Thirty-three plant manufacturing cream cheese were visited (R. 14). These plants manufacture a considerable portion of all the cream cheese manufactured in the United States, and the methods used by them are representative of those used all over the country (R. 14). The second survey (Gov. Ex. 4; R. 1013) covered six representative cities, and was made with the purpose of securing information concerning the fat and moisture content of "all of the different brands of cream cheese * * * with as complete coverage as possible" (R. 840–841).

These surveys furnished a substantial basis for the determination by the Administrator as to the composition of cream cheese on the market today. Government Exhibit 2 (R. 367) shows that out of 43 samples of cold-pack cheese secured from the 33 plants visted in 13 states, 31 had not less than 35 percent of fat and 36 not less than 33 percent; and that 26 had not more than 55 percent of mois-

ture, with 7 of the remaining 17 exceeding 55 percent by but a fraction of one percent. It shows that out of 12 samples where the process of manufacture was unknown 8 had not less than 35 percent of fat and 8 not more than 55 percent of moisture. It shows that all cheese, both cold-pack and hot-pack, secured from Wisconsin, a leading cheese-producing state, contained less than 55 percent of moisture, and that all of such cheese contained more than 35 percent of fat excepting one sample that contained 34.66 percent.

Government Exhibit 4 classifies the cheese analyzed as package or bulk, the package usually being cold-pack and the bulk usually hot-pack (R. 43, 54). With respect to package cheese it shows that in Chicago, out of 57 samples purchased only 8 contained less than 35 percent of fat and only 10 more than 55 percent of moisture, and that of the latter 10 four exceeded 55 percent of moisture by less than one percent; that in San Francisco, out of 38 samples only 3 contained less than 35 percent of fat and only 2 less than 33 percent, whereas only 8 contained more than 55 percent of moisture and of these 8 five exceeded 55 percent by less than one percent; that in St. Louis, out of 25 samples 8 contained less than 35 percent of fat and 11 more than 55 percent of moisture, but of the latter 11 four exceeded 55 percent by less than one percent; that in Philadelphia, out of 24 samples only 7 contained less than 35 percent of fat and only 5

less than 33 percent, and only 5 more than 55 percent of moisture; and that in New York, out of 19 samples 4 contained not less than 35 percent of fat and 13 not less than 32 percent, and 13 not over 55 percent of moisture. Practically all of the industry witnesses testified that they make a high-fat, low-moisture product approximating the limits fixed by the Administrator (R. 176, 194–195, 224–225, 274, 301, 303–304, 316, 344–345). In addition to a low-fat cream cheese, petitioner Zausner makes a traditionally high-fat, low moisture cream cheese running 37 to 40 percent of fat and 50 to 55 percent of moisture, which accounts for half his total cream cheese volume (R. 345); similarly, petitioner Conestoga Cream & Cheese Mfg. Corporation makes a product running in excess of 34 percent of fat which accounts for 20 to 25 percent of its total sales (R. 176), and petitioner Newark Cheese Company makes one running 33 to 35 percent of fat and 56 to 58 percent of moisture which accounts for around 20 percent of its total sales (R. 316). Prior to its adoption of the hot-pack process about 1933, the cheese manufactured by petitioner Columbia Cheese Company ran 35 to 36 percent in fat (R. 338).

The reason for reducing fat and increasing moisture while retaining the name "cream cheese" is economic—"to increase the yield for competitive reasons" (R. 228–229). Petitioners' own witnesses conceded at the original hearing that the

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only basis of their objection to the then proposed standard of 34 percent fat—55 percent moisture was that "economically it is impossible for us to merchandise this higher standard product in competition with the highly advertised brands" (R. 333, 141–142, 170)—a conclusion disputed by other testimony (R. 207, 213, 229) and by the experience of petitioner Zausner in making a 37 to 40 percent fat—50 to 55 percent moisture product that accounts for half his total volume (R. 344–345). A representative of petitioner East Smithfield Farms conceded that the increase in sales of the low-fat, high-moisture product, on which petitioners laid so much stress at the hearing (R. 141, 329), would not have occurred if the product had been sold by a name more descriptive of its fat content, such as "milk cheese" (R. 150).

c. *Consumer confusion and prejudice from sale of the low-fat, high-moisture product as "cream cheese."*—Among manufacturers and distributors the lower-fat product is distinguished from the higher by such designations as "second grade," "No. 2," "low test," "cheap," "substitute," etc. (R. 195, 200, 203, 216, 241, 271, 280, 374). But nothing on brands or labels indicates fat or moisture content (R. 160). Differences in manufacturing processes and differentiating terms used orally by manufacturers among themselves or in sales to jobbers are unknown to consumers (R. 14, 70). The cold-pack, high-test product is customarily sold

in small packages and the low-fat hot-pack cheese more often in bulk or in boxes, although there is no reason why both cannot be sold in either bulk or package form (R. 43–44, 54). Much of the hot-pack product in "loaf" form is sold by retailers after removal from the wrapping foil (R. 157), and there is testimony to a practice by some retailers of substituting low-fat high-moisture cheese in boxes carrying well-known labels of high-fat products (R. 196, 219–228). Price is therefore not sufficiently informative to the consumer as to fat or moisture content (R. 808–809), since there is no uniform differentiation in retail prices based on fat content. The ordinary consumer has no means of distinguishing the low-fat cheese made by the hot-pack process from a product with the traditional fat content of cream cheese (R. 152; Gov. Ex. 4). Only by experience as to taste, smell, feel, and appearance, and by putting these different types of cheese side by side, can the range of fat and moisture content be detected (R. 42, 45–47, 71, 76–77, 101, 154, 186, 188, 227, 687, 690). The use of moisture-retaining gum makes a low-fat, high-moisture cheese appear drier than it is (R. 42, 117), and the combination of heating and homogenizing with the addition of gum in the hot-pack process enables a low-fat, high-moisture cheese to simulate the "smoother body" usually associated with high-fat

content (R. 126) and "this smoothness has sometimes been mistaken for richness" (R. 227). Consumers buy cream cheese not only for its flavor but also for its nutritive properties (R. 363); and consumer belief that cream cheese is a high-fat product arises not only from the use of the word "cream" in the name itself, but from general understanding and the information made available through agricultural and consumer publications and official government bulletins (R. 83, 288, 349–350, 351–352, 363–364). The average consumer buys low-fat, high-moisture cheese "with the thought that she is getting high standard cream cheese" (R. 288).

4. *Additional evidence set forth in Argument.*— The evidence in support of the Administrator's choice of the name "neufchatel cheese" for the lower-fat higher-moisture product, and in support of the specific fat and moisture limits by which he differentiated "cream cheese" from "neufchatel cheese," is set forth *infra,* in the Argument, at pages 26–29; and the evidence in support of the pasteurization requirement of the cottage cheese standard (Regulation 19.525) is set forth *infra* in the Argument, at pages 34–35.

ARGUMENT

I

Petitioners contend (Pet. 17–20) that the failure of the cream cheese standard to include the

low-fat, high-moisture products sold by them as cream cheese (see *supra*, p. 12) renders the standard unreasonable.[9]

The authority of the Administrator under Section 401 of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, p. 3) is not, as petitioners assume, limited to gathering information as to the composition of foods and incorporating all such information in standards for their identity. His function is to establish standards that by their very nature exclude some products or exclude or limit some ingredients. If there were not a distinction between all that has been sold under a name of a particular food, and a legal "definition and standard of identity" for that food, the purpose of Section 401 could not be accomplished. Its effect then would be to perpetu-

[9] Petitioners urge (Pet. 15–16) that the unreasonableness of the cream cheese standard is shown by the fact that it differs substantially from the cream cheese standard adopted by the Department of Agriculture in 1921 pursuant to the Pure Food and Drugs Act of 1906. As we have shown above, footnote 7, p. 10, the earlier standard was only advisory, and it was based on the manufacturing techniques prevalent in 1921. Since that time the development of the hot-pack manufacturing process and the use of gums in cheese manufacture have necessitated the development of more rigid standards for the protection of the public. Moreover, the fundamental soundness of the earlier standard is open to serious question in that a product containing 90 percent moisture might have been sold as cream cheese (see *supra*, p. 10). In any event, the Administrator is not required under the 1938 Act merely to ratify previously existing advisory standards.

ate rather than to curb the trends toward economic adulteration that brought it forth.[10] The public interest in the establishment of "standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive," was expressly recognized and given effect by this Court in *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 228–232.

The 33 percent fat and 55 percent moisture limits of the cream cheese standard are fully sustained by the evidence and represent a reasonable exercise of the Administrator's judgment. Those limits clearly could not properly have been established by "picking out the lowest" percentage figure of fat or highest of moisture at which anyone may have made a product sold as cream cheese (R. 35–36), because "the trend has been

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[10] The cream cheese standard does for cream cheese what the Butter Standard Act of 1923 (21 U. S. C. 321a) did for butter. Prior to that Act various products with relatively low fat content were sold as butter. The Act established a standard for butter and thereby prohibited the sale of the low-fat product as butter. See S. Rep. No. 493, 73d Cong., 2d sess., p. 10. See also *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 232–233. The operation of the Act, it will be noted, precluded those low-fat products purporting to be butter from using that name, just as the cream cheese standard precludes low-fat cheese purporting to be cream cheese from being identified as cream cheese.

to put more moisture and less fat in the hot pack product * * * and * * * has gone further than it would be in the interest of the consumer to perpetuate" (R. 51). The basis of the choice of a 33 percent fat minimum and 55 percent moisture maximum is found in the testimony of government witnesses (R. 24–27, 33–37, 77–78, 82, 176, 183, 219, 576–577), of industry witnesses (R. 198–199, 220–221, 225, 226–229, 264–267, 276–277, 283–284, 345, 686–689, 700, 790–792); and of consumer witnesses (R. 349–350, 351–354, 363–364). Within these limits there is no opportunity for abuse of moisture-retaining gums (R. 283–285), as they do not then conceal excessive moisture. These limits require no new method of manufacture or anything new in the usual procedure, but only the use of ingredients that will produce the minimum fat content and a sufficiently controlled draining to limit the moisture content (R. 27, 52, 82–85, 87, 118–121, 123, 131, 220, 224). Hot-pack as well as cold-pack cream cheese is now being made by the methods and within the fat and moisture limits prescribed by the standard and can continue to be so made (R. 198–199, 226, 264, 265–267, 686–687, 790). The hot-pack product so made is a very satisfactory cream cheese (R. 199, 276, 283) and has consumer recognition and acceptance (R. 687, 758, 791). Petitioners' witnesses in effect conceded this at the original hearing (R. 152,

183, 333), their reason for opposing the standard being economic (R. 141–142, 170, 333).[11]

Since the evidence shows that the present practice has resulted in consumer confusion and misunderstanding (Statement, *supra*, pp. 16–18), the case falls clearly within the principles already recognized by the courts in dealing with the Food, Drug, and Cosmetic Act as well as other regulatory statutes (*Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218; *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Pacific States Box & Basket Co.* v. *White*, 296

[11] Petitioners argue (Pet. 18–19) that there is no substantial evidence to support Finding 20 that most of the product marketed today as cream cheese contains from 35 to 40 percent or more of fat and from 55 to 50 percent or less of moisture. We have set forth in the Statement (*supra*, pp. 12–15) the evidence in support of this finding. The Administrator did not find, as petitioners' discussion of Government Exhibits 2 and 4 would indicate (Pet. 18), that most hot-pack cheese contains not less than 35 percent of fat and not more than 55 percent of moisture, for Finding 26 expressly recognizes that most of the hot-pack cheese marketed today varies from about 23 to 30 percent of fat and from about 60 to 65 percent of moisture. Finding 26 does not conflict with the conclusion drawn by the Administrator that most of the cream cheese marketed today falls within the 35 to 40 percent fat range and the 50 to 55 percent moisture range. The traditionally high-fat, low-moisture product still constitutes substantially more than half of all that is sold as cream cheese (R. 226), and it was petitioners' own contention at the hearing that the low-fat, high-moisture product constitutes somewhere between one-fourth and one-third of the total volume of cream cheese produced (R. 35, 100, 146, 343–344).

U. S. 176, 181). The regulations being reasonable and within the statutory authority, it is immaterial that a particular manufacturer may be required to change his product or even that some products must be abandoned. (Cf. *Mugler* v. *Kansas*, 123 U. S. 623, 628–633; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683–684; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 302–303; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151).

II

Petitioners contend (Pet. 20–21) that Finding 23 is inconsistent with Finding 21 in that it does not make allowance for a 2 percent moisture variation that Finding 21 recognizes to exist. Finding 21 recognizes that in good commercial practice the percentages of fat and moisture in the finished cream cheese vary as much as 2 percent above or below the percentages that the manufacturer desires to obtain. Finding 23 states that, with full consideration for the variations in fat and moisture referred to in Finding 21, a reasonable fat minimum is 33 percent and a reasonable moisture maximum is 55 percent.

There is no inconsistency between these findings. The establishment of a 55 percent moisture ceiling nowise restricts the operation of a 2 percent variance; instead, it merely requires that the manufacturer must recognize and make allowance for the 2 percent variance in the making of

a finished product which may not contain more than 55 percent moisture if it is to be marketed as cream cheese.[12]

In Finding 22 the Administrator recognizes that just as soon as the fat content drops below 33 percent or the moisture content exceeds 55 percent, the product begins to take on the characteristics of something other than cream cheese (R. 1151).[13] This being true, it necessarily follows that the limits established are the outer limits and that any product not within them, because of an uncontrollable variance or for any other reason, may not properly be identified as cream cheese. And in adopting these limits the Administrator made it clear by Finding 23 that he did so with full recognition of the 2 percent

[12] Although the Administrator found that most of the cream cheese marketed today contains from 35 to 40 percent or more of fat (Finding 20, R. 1151), he was able to lower the limit 2 percent for the variance, for he found that the product would remain cream cheese if it had a 33 percent fat content (Finding 22, R. 1151). In respect of the moisture content he found that most cream cheeses on the market have from 55 to 50 percent or less of moisture (Finding 20, R. 1151) and that a product with more than 55 percent moisture began to be something other than cream cheese (Finding 22, R. 1151). This being so, it was impossible to raise the permissible moisture content to 57 percent and still identify the product as cream cheese.

[13] By letter of October 22, 1943, the Administrator assured counsel for petitioners that as soon as administratively feasible he would reopen the proceedings to permit petitioners to introduce further evidence regarding the maximum moisture limit of cream cheese.

variance noted in Finding 21. In these circumstances it is plain that Findings 21, 22, and 23 are wholly consistent with each other and, supported as they are by substantial evidence, furnish a reasonable basis for the regulation.

Petitioners' suggestion that there is no justification for basing a standard for hot-pack cream cheese upon the characteristics of cold-pack cream cheese (Pet. 21) fails to recognize the abundant evidence, *supra*, pp. 11–15, that hot-pack and cold-pack cream cheese of the same fat and moisture content are not different products and that hot-pack cream cheese is being made by the methods and within the fat and moisture limits prescribed by the standard. This being so, the Administrator could reasonably have concluded that one standard was fair and adequate for all cream cheese regardless of the process of manufacture.

III

Petitioners contend (Pet. 15–17) that the name "neufchatel" does not identify the product excluded from the cream cheese standard "under its common or usual name" within the meaning of Section 401 of the Act. There is, we submit, no merit in this contention. The assignment of the name "neufchatel cheese" to the low-fat, high-moisture product is supported by substantial evidence and is reasonable and within the authority of the Administrator.

Because of the traditional fat and moisture content of neufchatel [14] cheese, that name was a natural and almost automatic choice for the low-fat, high-moisture product properly excluded from the cream cheese standard.[15] In its composition neufchatel cheese has varied from about 20 to 29 percent of fat and from about 55 to 65 percent of moisture (R. 99, 453, 578–579, 785, 794–802). For many years prior to about 1924 it was widely sold in the United States and was well known to consumers (R. 184, 237–238, 690–692). But competitive conditions in the cheese industry resulted in a progressive cheapening of neufchatel cheese, by lowering its fat content, until consumer demand for it practically disappeared (R. 184–185, 215, 235, 237–238, 419, 578–579, 691–692); and in recent years the name "neufchatel" has virtually disappeared from the market. A government witness testified that "The

[14] Neufchatel is also the name of the manufacturing process by which such cheese, as well as cream cheese, is produced (*supra*, p. 8).

[15] A government witness testified, in reference to the proposal on which the hearing was held, that "that name was picked because of past history," that it "had been the name of the cheese which was next down in the fat scale from cream cheese," and that "it is a name which so far as the industry is concerned, that most nearly approaches the cheese in that fat range, and of that general character, of a soft cheese made within the provisions of this proposal" (R. 859); and an industry witness stated that "it would appear perfectly reasonable, in the light of history, to call the lower-fat product neufchatel" (R. 693).

same thing happened to neufchatel cheese right then as is being brought about right now in cream cheese" (R. 579), and an industry witness testified to the same effect (R. 237–238). The record clearly shows that the name is still well known in the trade [16] and, as one industry witness showed, it has repeatedly been included in agricultural publications and textbooks on cheese manufactured as late as 1936 (R. 794, 796–797, 799–801).[17]

No more consumer education to the name "neufchatel" is required than to any other name than "cream cheese" that might be adopted (R. 870); and a distinctive name for a perfectly wholesome product is less likely to cause consumer confusion, misunderstanding, or suspicion than to call it "No. 2," or "Grade B," or "substandard." [18]

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[16] Cheese known by the name "neufchatel" is still made in California (R. 419) from 3.6 percent milk (R. 811–812). It has been sold commercially in Washington, D. C., within the past ten years (R. 99). Petitioner East Smithfield Farms made neufchatel cheese under that name as late as 1932 or 1933 (R. 409). Petitioner Conestoga Cream & Cheese Manufacturing Corporation formerly made it (R. 184).

[17] In fact, it is presently rationed by the Office of Price Administration. See Table 10, Official Table of Consumer Point Values for Meats, Fats, Fish and Dairy Products (9 Fed. Reg. 105).

[18] In respect of petitioners' suggestion (Pet. 16–17) that the Administrator might have used qualifying words in connection with cream cheese to distinguish between the high-fat and the low-fat product, it should be noted that among people in the industry the cheese in question had come to be known as "second grade," "No. 2," "low test," "cheap," "sub-

Consumers who desire the low-fat product for the very reasons, such as less caloric content, that justify the denial to it of the name "cream cheese," are the better enabled by the distinctive

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stitute" (R. 195, 200, 203, 216, 241, 271, 280, 374). And one industry witness suggested that the proposed standard should call this cheese "substitute cream cheese" or "substandard cream cheese" (R. 271; see R. 280). It is difficult to believe that petitioners would have preferred any of these names to "neufchatel." Moreover, one industry witness testified that in his opinion requiring "two different names" for the high- and low-fat products is "in the interest of honesty and fair dealing" (R. 810–811); another that he "would not approve of two different standards for cream cheese, one to contain a lower percent of fat than the other," for the reason that it "would be confusing and there would be too much possibility of substitution, which would not promote fair dealing in the interest of the consumer" (R. 302); and a third that the low-fat cheese is different in identity from cream cheese as the average consumer understands it (R. 200) and that "we consider this No. 2 an inferior cheese. We feel it is a cheese which should not be sold as a cream cheese, and we feel it is a fraud to try to put cream cheese like that over on the public as cream cheese" (R. 202–203). The Administrator concluded that it "would not promote honesty and fair dealing in the interest of consumers to establish a definition and standard of identity for low-fat, high-moisture, soft uncured cheese made by the hot-pack process, under the name 'cream cheese' or a name which includes the words 'cream cheese'" (R. 1161). We believe it to be evident from the record that this conclusion is amply sustained. Compare *Houston* v. *St. Louis Packing Co.*, *supra*, in which this Court held that under the Meat Inspection Act of June 30, 1906 (34 Stat. 669, 676, 678), the Secretary of Agriculture was justified in prohibiting the sale as sausage of a product containing more than 2 percent of cereal or 3 percent of water or ice despite the fact that prior to the regulation excess quantities of cereal and water were used by sausage manufacturers in the product they sold as "sausage."

name of "neufchatel" to know what they are purchasing and to get what they may reasonably expect to receive by that name (R. 349–350), the same as are purchasers who expect from the name "cream cheese" to receive the traditionally higher-fat, lower-moisture product. The two standards thus promote honesty and fair dealing in the interest of consumers in that they "definitely differentiate between what have grown up to be two types of cheese, which at the present time are both sold as cream cheese, and * * * permit the purchaser who desire[s] to buy the high-fat type, to buy it under the name of cream cheese, and to buy the low-fat type under the name of neufchatel cheese, whereas at the present time just by calling for cream cheese, you cannot tell what you will get" (R. 869).[19]

[19] Actually, a sizable proportion of the product sold in recent years as "cream cheese" is in fact neufchatel. An industry witness testified that "from the very first commercial manufacturing of neufchatel and cream cheese in this county, there has been a distinct differentiation of the two cheeses on the fat content," and that although competition since 1930 has resulted in a low-fat product being referred to on the market as "cream cheese," "this product is really a neufchatel cheese and should be sold under that name" (R. 801–802). This is corroborated by other witnesses (R. 71, 133, 257, 578–579, 594–595, 693). A government witness testified that it is not "anywhere near as misleading to call a product [neufchatel] that is exactly neufchatel, or has the composition of neufchatel, as much as it is to call a product cream cheese that has 10 percent less fat than cream cheese has had, or does have, or had in the days when neufchatel was being marketed under that name" (R. 580).

The situation in this case is strikingly similar to that considered by this Court in *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218. There, as here, the Administrator established standards for two closely related products. Prior to the standards for farina and enriched farina, the kinds and quantities of enriching ingredients in enriched farina varied widely. In promulgating standards of identity for farina and enriched farina, the Administrator sought to insure that consumers who purchase either product will get what they may reasonably expect to receive. He concluded on the basis of substantial evidence that it would promote honesty and fair dealing in the interest of the consumer and would avoid consumer confusion, to require that enriched farina contain minimum quantities of specified vitamins and minerals. Similarly, prior to the standards for neufchatel cheese and cream cheese, the fat and moisture content of cream cheese varied widely. In promulgating standards of identity for neufchatel cheese and cream cheese, the Administrator likewise sought to insure that consumers who purchase either product will get what they may reasonably expect to receive. He concluded on the basis of substantial evidence that it would promote honesty and fair dealing in the interest of the consumer and would avoid consumer confusion, to require that cream cheese contain a specified high-fat and low-moisture content.

We have shown, we submit, that the name "neufchatel" is an appropriate and reasonable designation for the low-fat cheese; and that fact is an adequate basis for its use by the Administrator. We submit that the *Quaker Oats* decision is controlling of the issue here. A name that has a rational basis and is consistent with the statutory purpose of promoting honesty and fair dealing in the interest of consumers is within the Administrator's authority to adopt. The name "neufchatel" not only meets such criteria but has been associated with, and indeed is the common and usual name of, a cheese that in fat and moisture content has always fallen within the limits specified by the Administrator in the standard for neufchatel cheese.[20] Its use is, therefore, supported by reason as well as the evidence and the Administrator's findings.

IV

Petitioners complain (Pet. 22–23) that they are not permitted to add water to the curd in the manufacture of cream and neufchatel cheese by the hot-pack process, although at the hearing none of them testified that they actually did so use it (see R. 432–433). The Administrator, however, based on the testimony of another witness,

[20] This being true, there is, of course, no necessity for a finding by the Administrator that the name "cream cheese" is impractical of application to that cheese identified by the Administrator as "neufchatel."

found that water is sometimes added to the curd for the purpose of adjustment to the percentage of fat and moisture desired in the finished product; but he further found that "the addition of skim milk, which is ordinarily used for this purpose, permits any adjustment for moisture that can be accomplished by the addition of water" (Finding 27; R. 1152).

Two principal purposes may be served by the addition of water. One is to dissolve the gum used in the hot-pack process (R. 831–832, 836–837). For this purpose petitioner Columbia Cheese Co. uses cream or skim milk (R. 432). The other purpose, as stated in the finding, is to adjust the fat percentage. Such adjustment, by whatever medium, of course is proper only if the resulting fat and moisture percentages in the finished product do not violate the limits set by the standards. There was virtually no testimony of the desirability of the use of water. One Government witness saw no objection to it under the exceptional circumstances embodied in the question which he was then answering (R. 604–605). But an industry witness testified that in his opinion a good product cannot be made using water (R. 680), and another that the introduction of further moisture at this stage of manufacture is not good commercial practice, and that his company does not do it (R. 539, 563). The

Administrator undoubtedly felt that, since skim milk, which he found is customarily used (R. 1152), serves the purpose equally well if not better and is a dairy product, there is no need, but, on the contrary, some danger in endorsing the use of water. It is well known that water is the most common economic adulterant of foods and to sanction its use, when a dairy product just as effective or more so is available, would not be consistent with a sound policy of standardization designed to maintain the integrity of cream and neufchatel cheese as dairy products. It seems plain that the Administrator's judgment in the matter is reasonable and adequately supported. He chose the better of two possible alternatives.

V

Petitioners' contention (Pet. 24–25) that Regulation 19.525, precluding the use of unpasteurized skim milk in the manufacture of cottage cheese, is unsupported by an appropriate finding and that it is, therefore, arbitrary and unreasonable, is, we submit, without merit.[21] The Administrator found that the starting material from which soft uncured cheeses are made is pasteurized, and that pasteurization is necessary to avoid

[21] Because of the current impossibility of getting pasteurization equipment, the Administrator has postponed the enforcement of this requirement until such equipment shall have become available.

objectionable odors and flavors contributed by the growth in raw milk of certain bacteria (Findings 8 and 9; R. 1149). Cottage cheese is a soft uncured cheese (Finding 46, R. 1155) and these findings are applicable to it (Finding 47, R. 1155).

It has been shown (supra, p. 9) that methods of manufacturing soft uncured cheeses are an essential factor contributing to their distinguishing characteristics of appearance, texture, flavor, smell, and taste. The method of manufacture is therefore a necessary and appropriate consideration in prescribing definitions and standards of identity. It would in fact be impossible to define a cheese without fixing the basic essentials of the manufacturing process. The only question, therefore, is whether there is substantial evidence that pasteurization of the skim milk used as the starting material for cottage cheese is an essential part of the manufacturing process. It is significant that petitioners do not object to the same requirement with respect to the starting material for cream and neufchatel cheese.

Good commercial practice requires pasteurization (R. 1000). A government witness testified that all dairies visited in an investigation by the Food and Drug Administration of present practices throughout the United States in the manufacture of cottage cheese (R. 965–969, Gov. Ex. 11) were pasteurizing the starting material (R. 977), and that pasteurization is necessary "in

order to make a uniform product with good qualities" (R. 977). It is deemed essential by a concern manufacturing over 12,000,000 pounds annually (R. 991–992, 993–995) and the representative of an association of 26 dairies producing over 10,000,000 pounds annually testified it would not be advisable to permit the use of unpasteurized skim milk (R. 682–683). The pasteurization requirement was also favored by state university authorities on cottage cheese manufacture and dairy bacteriology (R. 993–995, 997–998). Cottage cheese is highly perishable (R. 987), and pasteurization provides substantially better keeping qualities than it otherwise would have (R. 735, 987, 1000). Unless the bacteria causing the objectionable odors and flavors referred to in the Administrator's finding are eliminated by pasteurization, a uniform product with the minimum keeping qualities needed for its sale in interstate commerce cannot be assured.

The evidence supporting the findings with respect to pasteurization of the skim milk from which cottage cheese is made is plainly substantial. The reasonableness of the requirement is apparent from the evidence that it represents what is now almost universally the industry practice, and results in a better keeping product of more uniform quality and the characteristics that consumers may reasonably expect to find present. It is evident that consumer interest in such a requirement

is great, and that it will promote honesty and fair dealing toward consumers.[22]

CONCLUSION

We submit that the administrator did not depart from the statutory requirements in choosing these standards of identity for the purpose of promoting fair dealing in the interest of consumers, that the standards which he selected are adapted to that end, and that they are adequately supported by findings and evidence. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1944.

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[22] Although petitioners assigned as error (Pet. 14) the court's affirmance of Regulation 19.525 requiring that the moisture content of cottage cheese not exceed 80 percent, they have not argued the point. Plainly Regulation 19.525 is supported by substantial evidence and is reasonable (R. 612, 732, 965–969, 973–974, 976, 980, 981–984, 1005–1008).

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Supreme Court of the United States

October Term, 1943.

No. 614.

COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE MFG. CORP., EAST SMITHFIELD FARMS INC., EDELSTEIN DAIRY CO. INC., NEWARK CHEESE CO. INC., ROSEDALE DAIRY CO. INC., SODUS CREAMERY CORPORATION, and MEYER ZAUSNER,

Petitioners,

vs.

PAUL McNUTT, as Federal Security Administrator of the United States.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

The Administrator's answering brief argues evidentiary detail but avoids the questions of law to be determined. The petitioners are not permitted to indulge in such an analysis of the evidence upon this application for a writ of certiorari (Rule 38 of this Court, and cases there cited), but some of the statements made are too inaccurate or misleading to go unchallenged. First, petitioners will refer to the cases cited by the Administrator.

A. Cases.

The Administator's citation of cases (Adm'r. Br. 22-23) starts with the assumptions "that the present prac-

tice has resulted in consumer confusion" as to which there is no finding by the Administrator, and that the regulations are "reasonable and within the statutory authority" which is the very issue in the case.

The cases cited fall into two classes. In the first class are *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Hebe* v. *Shaw*, 248 U. S. 297; *United States* v. *Carolene Products Co.*, 304 U. S. 144; and *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176. All of these cases deal with an issue not in the least involved herein, viz., the question of legislative power, federal or State, under the Constitution. Nowhere in the petition is the question of Constitutional power raised.

The only point of similarity between these cases and the instant case is that in all of them a theretofore legitimate trade was either destroyed or regulated with resulting hardship and economic loss. But petitioners do not contend that Congress cannot validly enact legislation which will affect them adversely or even destroy their business. For the purpose of this case, it may be conceded that Congress could legally abolish all interstate commerce in cream cheese. That, however, in no way proves that in enacting the Federal Food, Drug and Cosmetic Act of 1938, Congress *intended* to impose unreasonable hardship on honest industrial enterprise, on the contrary, the statements of the President and the Congressmen responsible for the drafting of the Act clearly establish that such was not the legislative intent (Pet. 19-20).

In the second class of cases are *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218; *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479; and *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. The underlying, ever-present motif in all these cases is the recalcitrant manufacturer or merchant; the one or two or three producers who refuse to abide by a standard under

which the respectable or majority members of the industry do business. The cases all involve deviations from the norm. In other words, they deal with that "chiseling minority" (or, at least with that minority) against which Congress intended to legislate. In none of the cases is issue taken, as it is here, with an entire reputable industry, save a minority of one firm.

In *Federal Trade Commission* v. *Algoma Lumber Co., supra,* some new producers attempted to adopt an existing well established name for a different product, with the purpose of "palming off". This is quite different from the instant case where every member of the industry markets the product in question under one name and one name only.

The *Quaker Oats* case has been heretofore distinguished (Pet. 7, 8, 15). Nothing in the Administrator's brief compels the conclusion that the decision sustaining the Administrator's power to exclude extraneous vitamins from farina to prevent consumer confusion is decisive on the question of his power to deprive an industry of the basic name of cream cheese and foist on its product the name "neufchatel".

In *Houston* v. *St. Louis Packing Co., supra,* the petitioner was a single producer who alone objected to the standard imposed by the Secretary of Agriculture. In that case there was no issue with regard to the proper name and identification of the product in question. The product was found to be adulterated and it was a violation of the regulation to introduce it into interstate commerce under any name. In the instant case the product is not barred from the market but is denied its common and usual name or anything which resembles that name.

B. Facts.

1.

The Administrator in referring to the decision in the court below, states that one judge dissented "in part" (Adm'r. Br. 6). The fact is that the dissent in the court below embraces all of the standards which are here in issue.

2.

The Administrator states in his brief (p. 10) that although the standard of identity for cream cheese fixed under the Pure Food and Drugs Act of 1906 (37 Stat. 768) provided that it should contain "in the water-free substance, not less than sixty-five percent (65%) of milk fat," newertheless, "it theoretically recognized as cream cheese a product containing 90 percent of moisture and 6.5 percent milk-fat, since in such a case the 6.5 percent milk-fat content would constitute 65 percent of the water-free substance." The Administrator is forced to admit however that this "theory" bears no relation to reality.

The only reason given by the Administrator for the abandonment of this 40 year old standard is that the development of the use of gum has disturbed the previous comparatively stable relationship between moisture and the finshed product, by permitting the incorporation of more moisture than would be possible without its use (Finding 38, R. 1154). The only "X" quality in the 40 year old standard is the percentage of moisture in the finished product. When that is fixed the percentage of fat becomes certain, *i. e.*, 65 percent of the remaining substance. Having determined the "X" quality by fixing an absolute maximum for moisture at 55 percent, whatever alleged deficiency arose in the established standard as the result of the development of gum was obviated. Thus,

after fixing the maximum moisture at 55 percent, an exact definition, without variables, would have been achieved merely by adding the clause, "and contains no more than 55 percent moisture in the finished product" to the 1921 standard. Such definition would fix a minimum of 29.2 percent fat in the finished product (65 percent of the 45 percent water-free substance) (fol. 2246).

It is respectfully submitted that if the Administrator is to find that 55 percent moisture is reasonable then he must also find, under existing standards, that 29.2 percent butterfat is reasonable.

3.

The Administrator states in his brief (pp. 11, 12) that the development of the hot pack process resulted in a cheese product with less fat and more moisture than previously existed, implying that before about 1928 cream cheese generally contained a minimum of 33 percent fat and a maximum of 55 percent moisture. All of the evidence in the record on the subject, however, is to the effect that long before the discovery of the hot pack process, and for many years, practically all manufacturers produced cream cheese of less than 33 percent fat and more than 55 percent moisture. Mr. Taub testified (fols. 1765-1768) that in 1918 there was on the market cold pack cream cheese of less fat and more moisture. Mr. Zausner pointed out that as far back as his experience goes, which is 1923, the same was true. He testified (fols. 2106-2109) that in 1928, before the use of gum and the hot pack process, he manufactured a cold pack cream cheese testing 26 to 27 percent in fat, and that practically every concern manufacturing cream cheese at the time made a cold pack cream cheese of similar composition.

Even Mr. Page of Kraft, the only manufacturer who favors the standard promulgated by the Administrator,

admitted (fols. 649, 1950-1951, 1956) that as far back as 1914, cream cheese of less than 33 percent fat content was manufactured and marketed under that name.

4.

The Administrator goes to great lengths in his brief (pp. 13-15) in his attempt to sustain the finding that most cream cheese comes within the limits of the standard fixed. However, instead of doing the simple thing of adding up all of the samples collected and stating how many comply, the Administrator selects and segregates certain types and sets forth in his brief only such calculated results as would appear to serve his purpose. Thus he analyzes the cold-pack samples tabulated in Government Exhibit No. 2 and disregards the hot-pack cream cheese samples. He then analyzes the package cream cheese in Government Exhibit No. 4, which is stated as "usually being cold-pack" (Adm'r. Br. 14), and disregards the cream cheese sold in bulk. A true and accurate statement of the information contained in these government exhibits would show that in Government Exhibit No. 2 (R. 367-371) 96 samples of cream cheese were collected, of which 59, or more than half, do not comply with the standard. It would further show that in Government Exhibit No. 4 (R. 1013-1025), 395 samples of cream cheese were collected, of which 227, or more than half, do not comply.

It is clear that most of the samples do not comply and no involved or selective analysis can change the result. It is illogical to draw a conclusion from an analysis of a particular type of cream cheese that all cream cheese is of a particular test. The record shows that most package cold-pack cream cheese is Kraft's "Philadelphia Brand" cream cheese. The result, therefore, is that the Administrator's limits, which he ascribes to the entire industry,

are largely the trade practice of a single manufacturer. Thus, of the 57 samples of package cheese referred to as having been collected in Chicago (Adm'r. Br. 14), 40 are the product of a single manufacturer, and no one will deny that they were packages of "Philadelphia Brand" cream cheese.[1]

The reference to the State of Wisconsin as a leading cheese producing State (Adm'r. Br. 14) is misleading. A negligible amount of cream cheese is produced in Wisconsin and the samples of cream cheese collected in that State were all of a single manufacturer, and even the respondent's witness expressed doubt that the cheese was manufactured by the hot-pack process (fols. 2391-2394).

The respondent's attorney, in the face of the facts in the record, and the table contained in the petition (p. 26), does not contend that the industry makes a so-called "high-fat, low-moisture" product, *within* the limits fixed by the Administrator, but only "*approximating*" such limits (Adm'r. Br. 15). An examination of what is meant by the word "approximating" indicates that the approximation always exceeds 55 percent moisture.[2]

5.

The Administrator in his brief (p. 19) states that "his function is to establish standards that by their very nature exclude some products". Throughout the brief there is continual reference and implication that "some" products do not comply with the Administrator's stand-

(1) This is shown by fols. 2301-2303, wherein it is stated that all samples having the same fat and moisture content are of the same brand, the fat and moisture content given being the average of the first two samples tested of each brand where more than two samples of the same brand were purchased. Thus, in Chicago the 40 samples having a fat content of 37.41 and a moisture content of 52.86 are of the same brand and represent the average of only 2 of the 40 samples.

(2) The petitioner Zausner testified that his highest quality cheese tests 57% moisture (fol. 2105).

ard for cream cheese, and "some" manufacturers produce a non-complying product. The implication throughout the respondent's brief is that the petitioners are a minority who are attempting to attack the standard of the industry. The contrary is true. Of the twelve cream cheese manufacturers represented at the hearing, the petitioners constitute eight. Of the remaining four, two (Borden and Fairmont) likewise opposed the proposed standard (fols. 1611, 1970). The only manufacturers supporting the standard are the Kraft Company and the Breakstone Company, both of which are owned by National Dairy Products Corporation. *All* manufacturers make cream cheese which does not comply with the Administrator's standard (Pet. 26), and most of the cream cheese in the market does not comply (Pet. 18-19).

6.

In the same vein the Administrator's brief continually refers to a "high-fat, low-moisture" product and a "low-fat, high-moisture" product without defining what is meant by these terms. In fact, in different places in the brief, it appears that cheeses of different fat and moisture content are intended. For example, reference is made to cream cheese falling within a 35 to 40 percent fat range (ftn. p. 22). The Administrator then states that this traditionally "high-fat, low-moisture" product still constitutes substantially more than one-half of all that is sold as cream cheese, and in support of this important allegation cites only page 226 of the record. An examination of the testimony of the (Kraft) witness found on that page indicates that the witness is not testifying from facts and figures, but is merely expressing his opinion, and that the "butter-fat content on that cheese is running from 33% to 36% fat". With due allowance made for variation of fat content in accordance with the Administrator's findings (Finding 21, R. 1151), any standard of fat in

excess of 31 percent minimum is contrary to the findings, and not based upon the so-called traditional product of cream cheese. The Administrator's brief then refers to the "low-fat, high-moisture" product as constituting somewhere between "one-quarter and one-third of the total volume of cream cheese produced", and cites certain page references from the record. An examination of the said page references establishes that what the witnesses were referring to was the lower grade of hot-pack cream cheese, which the witnesses referred to as the "25 percent butterfat class" cream cheese. It must be remembered that when the witnesseses refer to a "No. 2" cream cheese, or a "low-fat cheese", they refer to this so-called 25 percent class of cream cheese. That on the other hand, when they refer to a "No. 1"' cheese or a "high-fat cheese, they refer to cream cheese containing as low as 29% fat (fols. 337, 1224-1226, 1302, 1352,[3] 1449-1450, 2144).

The continual implication that a "high-fat, low-moisture" cheese was referred to by the witnesses as a cheese of a minimum of 35 percent fat and a maximum of 55 percent moisture is misleading and is not in accordance with the facts (See record references above). The respondent also states (Adm'r. Br. 16) that manufacturers and distributors distinguish the "low-fat product" by the name "hot-pack". There is not a single record reference to indicate that any manufacturer makes such a distinction. The fact is, as is clear throughout the record, that both the so-called "No. 1" and "No. 2" cream cheese, or "high-fat" and "low-fat" cream cheese, are made by the hot-pack process, as both are made by the cold-pack process. The distinction is not on the basis of the process employed.

(3) The figure 20 percent which appears in the printed record at this point should be 29 percent as in the original record.

7.

The Administrator states (Adm'r. Br. 20) that the limits of 33 percent fat and 55 percent moisture "clearly could not properly have been established by 'picking out the lowest' percentage figure of fat or highest of moisture at which anyone may have made a product sold as cream cheese". The petitioners do not contend that the Administrator should pick the lowest percentages at which any one may have made cream cheese. Petitioners contend that a standard should be fixed bearing a reasonable relation to the practice of the industry as a whole and that the Administrator's order does not do this. On the contrary, the Administrator has taken a figure even higher than the highest fat and moisture standard employed in the industry (Pet. 26).

8.

The respondent states in his brief (pp. 21, 25) that hot-pack cream cheese is being made within the fat and moisture limits prescribed by the standard and can continue to be so made, citing several record references. The pages referred to set forth the testimony of four Kraft witnesses, one Breakstone witness (a subsidiary along with Kraft, of National Dairy Products Corporation), and a Borden witness. An examination of their testimony indicates that the hot-pack cream cheese manufactured by Kraft tests from 52½% to 61% moisture (fol. 651). At the second hearing it was made clear by Mr. Page, who is in charge of production for Kraft, that hot-pack cream cheese of a minimum of 33% fat and a maximum of 55% moisture, is not sold by Kraft in the United States (fol. 1920); that the average test of Kraft hot-pack cream cheese is 29.8% fat and 58% moisture (fols. 1933-1934). Only the Borden Company has recently attempted to introduce to the American market a product of hot-pack

cream cheese which complies with the Administrator's standard, and its experience has been that the product is not salable (fols. 1583-1584).[4] The reason for this is that "in heating milk solids the heat has the effect to sort of expand the solids" (fol. 1619). As a result of this physical phenomena, while cold pack cream cheese containing 55 percent moisture may be salable cheese, hot pack cream cheese of similar test is too hard and too dry (fols. 1257, 1619, 2145).

9.

Attention should be drawn to the fact that references in the Administrator's brief to the testimony of an "industry witness" usually has reference to a Kraft witness (Adm'r. Br. 11, 26, 27, 28, 29). As stated in the dissenting opinion below, the Kraft Cheese Company was the only manufacturer which did not object to the requirement that a major portion of the product now known as cream cheese be hereafter known as "neufchatel" (R. 1173), a requirement which would promote a monopoly in its favor (Pet. 4).

10.

The Administrator calls the name "neufchatel" "a natural and almost automatic choice" for the product in question, formerly known only as cream cheese (Adm'r. Br. 26). "Natural" and "automatic" to whom? Certainly not to the industry which was uniformly, with one exception, opposed to its adoption (R. 1173). Certainly

(4) At the first hearing the Borden Company supported the Administrator's standard in the belief that they would be able to make hot pack cream cheese within the limitations proposed. Between the first and the second hearings, however, they attempted to put on the market a hot pack cream cheese of such a composition and they found that hot pack cream cheese testing less than 60% moisture was unacceptable as it was too dry and too firm (fols. 1640, 2145). On the basis of such experience the Borden Company changed its former recommendation and recommended a standard of 60% moisture and 28% fat (fol. 1611).

not to the impartial experts who stated that the change of name is not desirable (O. P. Exhibit 9, R. 1046). Certainly not to the consumers who never heard of "neufchatel".

"Neufchatel" cheese was defined and known in 1921 as the product made from milk containing 50 percent fat in its moisture-free substance (Food and Drug Administration, S. R. A. No. 2, Rev. 5). Cream cheese, on the other hand, contains 65 percent fat in its moisture-free substance. All of petitioners' product complies with the latter definition and is and always has been cream cheese and nothing else. The difference in the relationship of fat to solids compels the addition of cream to milk in order to get cream cheese (fols. 1410-1411). This is the basic difference between what was once known as "neufchatel" and cream cheese. All of the petitioners' product is made with the addition of cream. In addition to this difference in the starting material, both Government and industry witnesses testified to differences of appearance, texture, keeping qualities, fat content, method of coagulation, use of gum, pasteurization, homogenization and method of treating the curd (fols. 1556, 1705-1712, 1778, 1864, 2077, 2122). In view of all of these differences which exist between the cream cheese which is being deprived of its common and usual name, and the product which has fallen into disrepute under the name "neufchatel" cheese (Finding 45, R. 1155), it is not surprising that the *Committee on Cheese Quality of the American Dairy Association*, one of whose members is Mr. H. L. Wilson, Government witness, reports that it is against the application of the name "neufchatel" to this product. O. P. Exhibit 9, (R. 1045) which contains a report of this Committee, also contains comments which are pertinent to the question of whether "neufchatel" is an appropriate name for this cheese. In answer to the question

whether this change of name is desirable none of the impartial experts answered in the affirmative, six of the seven said "no", one said "perhaps" (R. 1046).

11.

The Administrator states (Adm'r. Br. 31) that none of the petitioners actually testified that they use water in the manufacture of hot-pack cream cheese. That petitioners do use water for the purposes of adjustment of the fat and moisture content is, however, clear from the testimony and the history of the standards. The originally proposed standard of 1940 (R. 1067-1068) made no provision for the addition of any liquid in the manufacture of hot-pack cream cheese. At the reopened hearing in 1941, the petitioners showed that they must use a liquid in the manufacture of hot-pack cream cheese, and that the liquid added "might" be cream, milk, skim milk, or water, depending upon the curd being worked with (Comford, fol. 1357). See also fol. 1000. It is also clear from the record that petitioner Newark Cheese Company uses water in the manufacture of its hot-pack cream cheese (fols. 1805-1806). Not a single manufacturer, except Borden, testified that he did not use water. In fact, Kraft uses only water (fol. 2184). The Borden Company not only does not use water, but in their particular process does not use any liquid of any kind, whether cream, milk, or skim milk (fols. 1606, 1649). This is due to their particular type of equipment and process, whereby they leave the whey in the curd before applying heat (fols. 1606, 1660). The Administrator has found that a liquid is added at this point (Finding 27, R. 1052), and the Borden practice is the exception and not the rule. The reference in the Administrator's brief (Br. 32) to testimony that it is not good commercial practice to add a liquid, refers to testimony of the Borden witness whose practice is the single excep-

tion in the entire industry. The Administrator's own Finding 27 refutes this statement.

In the only reference in the Administrator's brief to testimony that a good product cannot be made using water (Adm'r. Br. 32), *the witness is not testifying about hot-pack cream cheese, but about cottage cheese and creamed cottage cheese.* The witness, Mr. Perry, testified only with reference to cottage and creamed cottage cheese. The milk companies he represented do not manufacture cream cheese. An examination of the record (fols. 1884-1885) indicates that the witness advocates the addition of cream or milk to cottage cheese in the manufacture of creamed cottage cheese. There is no pertinence whatever in this testimony to the issue here. Since the end product must meet the fat and moisture requirements of the standard, the exclusion of the use of water, without any finding to support such exclusion, is arbitrary.

Conclusion.

It is respectfully submitted that novel and important issues not heretofore raised under the new Food, Drug and Cosmetic Act are involved in this case; that the standards promulgated do not define the product in question by its common and usual name so far as practicable; that they do not promote honesty and fair dealing in the interest of consumers and are arbitrary and unreasonable and not supported by substantial evidence of record; that the importance and scope of the issues herein warrant the granting of this petition.

Respectfully submitted,

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February, 1944.